87-2098
No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

JAMES H. BURNLEY, IV, SECRETARY OF TRANSPORTATION,
APPELLANT

v.

MID-AMERICA PIPELINE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JURISDICTIONAL STATEMENT

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

BRIAN J. MARTIN
Assistant to the Solicitor General

ROBERT S. GREENSPAN
BRUCE G. FORREST
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

GEORGE W. TENLEY, JR.
Chief Counsel

BARBARA BETSOCK
Attorney
Department of Transportation
Washington, D.C. 20590

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QUESTION PRESENTED

The Department of Transportation administers pipeline safety programs created by the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. (& Supp. III) 1671 *et seq.*, and the Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. (& Supp. III) 2001 *et seq.* Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 140-141 (to be codified at 49 U.S.C. App. 1682a) directs the Secretary of Transportation to recover the costs of administering those two pipeline safety programs by assessing and collecting fees from pipeline operators. The question presented is whether Section 7005 represents an unconstitutional delegation of the legislative power of taxation.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The findings and recommendations of the Magistrate (App., *infra*, 1a-13a) are unreported. The district court's order adopting the Magistrate's recommendations (App., *infra*, 14a) is also unreported.

JURISDICTION

The judgment of the district court (App., *infra*, 15a-16a) was entered on February 9, 1988. A notice of appeal was filed on March 9, 1988 (App., *infra*, 17a-18a). On April 29, 1988, Justice White entered an order extending the time within which to docket this appeal to and including June 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.[1]

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[1] Congress has passed a bill that repeals 28 U.S.C. 1252. See S. 952, 100th Cong, 2d Sess. (1988); 134 Cong. Rec. H3988-H3989 (daily ed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1, of the Constitution provides, in pertinent part: "All legislative Powers herein granted shall be vested in a Congress of the United States * * *."

Article I, Section 8, provides, in pertinent part: "the Congress shall have Power To lay and collect Taxes, [and] * * * [t]o regulate Commerce * * * – And * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *."

Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 140-141 (to be codified at 49 U.S.C. App. 1682a) provides:

PIPELINE SAFETY USER FEES.

(a) ESTABLISHMENT. –

(1) SCHEDULE. – The Secretary of Transportation (hereafter in this section referred to as the "Secretary") shall establish a schedule of fees based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines. In establishing such schedule, the Secretary shall take into consideration the allocation of departmental resources.

(2) COLLECTION. – The Secretary shall establish procedures for the collection of such fees. The Secretary may use the services of any Fed-

June 7, 1988). The President has not yet signed this bill. In any event, that legislation does not affect this case because Section 7 of the bill states that the law "shall take effect ninety days after the date of the enactment of this Act * * * [and] shall not * * * affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date."

eral, State, or local agency or instrumentality to collect such fees, and may reimburse such agency or instrumentality a reasonable amount for such services.

(3) LIABILITY.—Fees established under this section shall be assessed to the persons operating—

(A) all pipeline facilities subject to the Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. App. 2001 et seq.); and

(B) all pipeline transmission facilities and all liquefied natural gas facilities subject to the jurisdiction of the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. App. 1671 et seq.).

(b) TIME OF ASSESSMENT.—The Secretary shall assess and collect fees described in subsection (a) with respect to each fiscal year before the end of such fiscal year.

(c) USE OF FUNDS.—Funds received under subsection (a) shall be used, to the extent provided for in advance in appropriation Acts, only—

(1) in the case of natural gas pipeline safety fees, for activities authorized under the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. App. 1671 et seq.); and

(2) in the case of hazardous liquid pipeline safety fees, for activities authorized under the Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. App. 2001 et seq.).

(d) FEE SCHEDULE.—Fees established by the Secretary under subsection (a) shall be assessed against all natural gas and hazardous liquids transported by pipelines subject to the Natural Gas

Pipeline Safety Act of 1968 and the Hazardous Liquid Pipeline Safety Act of 1979 after September 30, 1985, and shall be sufficient to meet the costs of activities described in subsection (c), beginning on October 1, 1985, but at no time shall the aggregate of fees received for any fiscal year under this section exceed 105 percent of the aggregate of appropriations made for such fiscal year for activities to be funded by such fees.

STATEMENT

1. In 1986, Congress enacted the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. No. 99-272, 100 Stat. 82. Section 7005 of COBRA, 100 Stat. 140-141, directs the Secretary of Transportation (Secretary) to adopt a system of fees to cover the costs of federal pipeline safety programs administered by the Department of Transportation under the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. (& Supp. III) 1671 *et seq.*, and the Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. (& Supp. III) 2001 *et seq.*[2] Section 7005(a)(3), 100 Stat. 140, states that the fees "shall be assessed to the persons operating" pipeline facilities subject to the two safety Acts. The fees must be assessed prior to the end of each fiscal year (§ 7005(b), 100 Stat. 140), and must be sufficient to pay the costs of the two safety programs as "provided for in advance in appropriation Acts" (§ 7005(c), 100 Stat. 141). Section 7005(a)(1) of COBRA, 100 Stat. 140, directs the Secretary to "establish a schedule of fees based on the usage, in reasonable rela-

[2] Those acts, in general, authorize the Secretary to establish national pipeline safety standards and to ensure compliance with those standards through enforcement measures including inspections.

tionship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines."

2. On July 15, 1986, the Secretary published fee schedules adopted pursuant to Section 7005. See 51 Fed. Reg. 25782-25783 (1986). The Secretary selected "pipeline mileage" as the measure of each firm's fee, reasoning that that criterion is closely related to the covered regulatory costs (*e.g.*, the cost of inspections of pipelines). The Secretary further observed that the major pipeline trade associations had reached a consensus that "pipeline mileage provides the most reasonable basis for determining fees to be paid by operators of gas transmission lines and hazardous liquid pipeline facilities." *Id.* at 25782, 46975, 46977. For fiscal year 1986, the Secretary established fees of $23.99 per mile of gas pipeline and $6.41 per mile of hazardous liquid pipeline (*id.* at 25783).[3]

3. Appellee Mid-America Pipeline Company owns and operates pipelines that transport hazardous liquids. As such, appellee is subject to the Hazardous Liquid Pipeline Safety Act (Complaint para. 3). On July 28, 1986, the Department of Transportation (DOT), acting pursuant to its published schedule of fees, assessed appellee $53,023.52 to cover its share of the costs of administering the safety act (*id.* para. 10). Appellee thereupon filed this suit, asserting that Section 7005 of COBRA is an unconstitutional delegation of the taxing power. The district court referred the parties' cross-motions for summary

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[3] The total costs of $7.773 million in that year for the two pipeline safety programs were allocated 80% to gas pipelines and 20% to hazardous liquid pipelines (51 Fed. Reg. 25783 (1986)). Total costs of both programs for fiscal year 1987 were $8.523 million, and for 1988 are projected to be $8.550 million. Department of Transportation and Related Agencies Appropriations Act, 1988, Pub. L. No. 100-202, 101 Stat. 1329-375.

judgment to Magistrate John Leo Wagner for a recommended decision.

On August 5, 1987, the Magistrate issued findings and recommendations (App., *infra*, 1a-13a). The Magistrate stated that there were no genuine issues of material fact, and that two legal issues were presented: "(1) [W]hether the 'user fees' contemplated by § 7005 are fees or taxes, and (2) if § 7005 imposes a tax, whether Congress may delegate the taxing power in this manner" (*id.* at 1a-2a (footnote omitted)). The Magistrate concluded "that the 'fees' assessed under § 7005 are taxes" (*id.* at 5a). The Magistrate then discussed, but neither accepted nor rejected, appellee's contention that Congress is subject to special restrictions with respect to delegation of the taxing power relative to its other powers (*ibid.*). Instead, the Magistrate (*id.* at 6a-11a) purported to analyze Section 7005 in light of this Court's decisions in *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394 (1928), and *American Power & Light Co.* v. *SEC*, 329 U.S. 90 (1946). The Magistrate found that Section 7005 leaves "the Secretary * * * free to appropriate the cost of regulation in almost any way [he] sees fit" (App., *infra*, 9a). By not specifying the fee schedules itself, the Magistrate declared, Congress has permitted the Secretary to charge a company "almost any figure from 0 - 100% of the entire [pipeline safety] appropriation" (*id.* at 10a).[4] The Magistrate accordingly concluded that Section 7005 is unconstitutional: "This statute asks more from the Secretary than aid in implementing a tax established by the legislature; it asks the

[4] The Magistrate referred to figures presented by appellee in oral argument and stated that Section 7005 allows the Secretary to charge appellee anywhere between 5% and 28.3% of the total appropriation (App., *infra*, 9a). The figures relied upon by the Magistrate were contained in an exhibit used by appellee that had in fact been ruled inadmissible (Mar. 25, 1987 Tr. of Oral Arg. 11-13).

Secretary of Transportation to use [his] discretion and *set* the rate of fees which is in fact a tax, and then go one step further and collect such taxes" (*ibid.*).

The Secretary filed exceptions to the Magistrate's report. On December 30, 1987, however, the district court entered a brief order (App., *infra*, 14a) adopting the Magistrate's recommendations. On February 9, 1988, the district court entered a judgment (*id.* at 15a-16a) declaring Section 7005 unconstitutional and enjoining the Secretary from enforcing that section against appellee.

THE QUESTION IS SUBSTANTIAL

Congress has in recent years enacted several provisions designed to recover the costs of particular regulatory programs through a system of fees imposed on those entities regulated under the program. In addition to the statute at issue in this case, which concerns the pipeline safety programs administered by DOT, Congress has also directed the Nuclear Regulatory Commission (NRC) to recover part of the costs of nuclear powerplant licensing and inspection programs through a system of fees (see COBRA § 7601(a), 100 Stat. 146-147) and has instructed the Federal Energy Regulatory Commission (FERC) to recover the costs of its regulatory programs through a system of fees (see Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 3401, 100 Stat. 1890-1891). The district court's decision in this case not only strikes down a statute that provides for the entire operating budget of DOT's two pipeline safety statutes (approximately $8.5 million per year), it also calls into question those other statutes and conflicts with a recent decision of the District of Columbia Circuit upholding NRC's new fee authority against a similar constitutional challenge. See

Florida Power & Light Co. v. *United States*, No. 86-1512 (May 13, 1988).[5] Moreover, the district court's judgment is demonstrably wrong. Section 7005 of COBRA is but one of many constitutional statutes that set forth "statutory standards" and call upon the Executive Branch "for the formulation of subsidiary administrative policy within the prescribed statutory framework." *Yakus* v. *United States*, 321 U.S. 414, 425 (1944). Thus, the Court should note probable jurisdiction.

1. a. As the Court observed in *INS* v. *Chadha*, 462 U.S. 919, 951 (1983), the Constitution divides the federal government "into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." The legislative power granted by Article I "is the authority to make laws." *Springer* v. *Government of the Phillipine Islands*, 277 U.S. 189, 202 (1928). The executive power created by Article II is the authority to "take Care that the Laws be faithfully executed" (Art. II, § 3). And the judicial power conferred by Article III is the authority, in appropriate cases and controversies, "to say what the law is" (*Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)) and whether the law has been violated. The Framers intended that these separate functions would serve as "the foundation of a structure of government that would protect liberty." *Bowsher* v. *Synar*, 478 U.S. 714, 722 (1986).

The so-called "non-delegation doctrine" is rooted in this principle of separation of powers. If each Branch of the federal government is to perform its assigned function,

[5] The constitutionality of FERC's new fee authority is currently being challenged before the same district court that rendered the judgment in this case. See *Mid-America Pipeline Co.* v. *FERC*, Civil Action No. 87-C-571B (N.D. Okla.).

Congress must enact legislation that "delineates the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority" (*American Power & Light Co.* v. *SEC*, 329 U.S. at 105). When Congress legislates in this manner, the Executive Branch is able "to understand the[] limits" of the law. *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 574 (1939). And the Judicial Branch, when presented with a case challenging executive action, is able "to ascertain whether the will of Congress has been obeyed" (*Yakus* v. *United States*, 321 U.S. at 426). Consequently, as the Court noted in *Field* v. *Clark*, 143 U.S. 649, 692 (1892), the principle "[t]hat Congress cannot delegate legislative power to the President" is "universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

b. Nevertheless, with one notable exception some 50 years ago, this Court has consistently rejected claims based on the non-delegation doctrine. During the first 150 years of its history, the Court uniformly held that challenged statutes did not unconstitutionally delegate legislative authority. See, *e.g., The Brig Aurora*, 11 U.S. (7 Cranch) 382 (1813); *United States* v. *Grimaud*, 220 U.S. 506 (1911); *Field* v. *Clark, supra.* In two decisions rendered in 1935, however, the Court struck down portions of the National Industrial Recovery Act of 1933 as unconstitutionally delegating the power to enact legislation. See *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935). The challenged provisions called for the creation of codes of fair competition for the entire economy, bypassed the normal administrative process, and "supplie[d] no standards for any trade, industry or activity" (*A.L.A. Schechter Poultry*, 295 U.S. at 541), creating what Justice Cardozo described as "a roving com-

mission to inquire into evils and upon discovery correct them" (*id.* at 551 (concurring opinion)). As such, the challenged provisions represented what was described as "delegation running riot" (*id.* at 553 (Cardozo, J., concurring)).

In the 53 years since *Schechter Poultry* was decided, the Court has uniformly upheld statutes challenged on non-delegation grounds. See, *e.g., United States* v. *Mazurie,* 419 U.S. 544 (1975); *United States* v. *Sharpnack,* 355 U.S. 286 (1958); *District of Columbia* v. *John R. Thompson Co.,* 346 U.S. 100 (1953); *Lichter* v. *United States,* 334 U.S. 742 (1948); *Yakus* v. *United States, supra; National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943); *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381 (1940); *Currin* v. *Wallace,* 306 U.S. 1 (1939). Section 7005 of COBRA squarely falls within this tradition. It sets forth Congress's policy determination, and calls upon the Executive to implement that policy by making "subordinate rules within prescribed limits" (*Panama Refining Co.* v. *Ryan,* 293 U.S. at 421).

2. a. Appellee contended in the district court (App., *infra,* 5a) that Section 7005 is unconstitutional because it directs the Secretary of Transportation to establish a "tax," and the taxing power, according to appellee, is subject to stricter limitations on delegation than are the other powers of Congress. Although we disagree that Section 7005 creates a "tax" as that word is used in Article I of the Constitution (see pages 13-14, *infra,*), any dispute over what label should be attached to the monies collected pursuant to the Act is irrelevant. There is simply no basis in the text of the Constitution or this Court's decisions for the proposition that Congress may not confer discretion on the Executive in carrying out Congress's tax policies that have been duly enacted into law.

Article I, Section 8, of the Constitution sets forth the many powers of Congress. One of those powers is the "Power To lay and collect Taxes." The taxing power, however, is not distinguished from any of the other enumerated powers (*e.g.*, the power to borrow money or to regulate commerce) in terms of the extent to which Congress may call upon the Executive to exercise discretion in carrying out its policies. Thus, there is no textual basis for concluding that Congress may give the Executive authority to make subsidiary rules governing such matters as maximum prices (see *Sunshine Anthracite Coal Co.* v. *Adkins, supra*) or unfair competition (see *FTC* v. *R.F. Keppel & Bro.*, 291 U.S. 304 (1934)), but not taxes. The Court recognized this point in *Lichter* v. *United States,* when it stated that "[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes" (334 U.S. at 778-779). Accord *Florida Power & Light Co.* v. *United States, supra* (rejecting claim that Congress's power to set rules relating to a tax is non-delegable); *Synar* v. *United States,* 626 F.Supp. 1374, 1385 (D.D.C.) (Scalia, Johnson, Gasch, JJ.) (rejecting contention that there are "core functions" that Congress may not delegate to the Executive), aff'd on other grounds, 478 U.S. 714 (1986).

Indeed, the Court's decision in *J.W. Hampton, Jr., & Co.* v. *United States,* 276 U.S. 394 (1928), forecloses appellees's contention that Congress's power to tax is treated differently from other powers when deciding whether a statute represents an unconstitutional delegation. In *J.W. Hampton,* the Court considered a challenge to a statute giving the Executive broad authority to set tariffs (a type of tax) on imported goods. The Court rejected the argument that Congress may not "use executive officers in the application and enforcement of a policy declared in law by

Congress * * * where Congress has exercised the power to levy taxes and fix customs duties" (*id.* at 409). The Court stated (*ibid.*):

> The same principle that permits Congress to exercise its rate making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise.

Contrary to appellee's suggestion below, *J. W. Hampton* was not overruled by the Court in *National Cable Television Ass'n* v. *United States,* 415 U.S. 336 (1974). In that case, the Court considered the power of federal agencies to assess fees under the Independent Offices Appropriation Act, 1952, 31 U.S.C. 9701. In construing that statute, the Court distinguished between "taxes" and "fees," and noted that it "would be a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power" (415 U.S. at 341). The Court then discussed the separation-of-powers principle of *Schechter Poultry* and *J. W. Hampton*: "Whether the present Act meets the requirement of *Schechter* and *Hampton* is a question we do not reach. But the hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems" (*id.* at 342). Thus, nothing in *National Cable Television Ass'n* casts doubt on the ability of Congress to pass a law that confers discretion on the Executive in matters related to raising revenue. In fact, *National Cable Television Ass'n* expressly notes that such a law, like any other statute challenged on non-delegation grounds, is

constitutional if it satisfies the principles announced in *Schechter Poultry* and *J.W. Hampton.*[6]

b. In any event, Section 7005 does not create a "tax." This is clear from the Court's decision in the *Head Money Cases,* 112 U.S. 580 (1884), in which the Court considered the constitutionality of a statute requiring ship owners to pay a duty of 50 cents for every non-citizen they transported to the United States. The money was used to pay the costs of administering the immigration laws. The Court, in rejecting a challenge to the statute as an unconstitutional tax, noted that "the true answer to all these objections is that the power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce—of that branch of foreign commerce which is involved in immigration" (*id.* at 595). For constitutional purposes, therefore, it is not necessary to identify a direct benefit conferred by the government in order to conclude that an exaction is a "fee" rather than a "tax"; a fee is also something which may properly be imposed on a party engaged in a particular activity in order to internalize costs imposed by that activity on the government or on society generally. The Court explained (*id.* at 595-596):

> The sum demanded of [the ship owner] is not * * * a tax or duty within the meaning of the Constitution.

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[6] The length of the Internal Revenue Code suggests that Congress often legislates with great precision in the area of taxation. But Congress has also chosen to give the Executive considerable discretionary authority in executing Congress's tax policies. For example, Congress has directed the Secretary of the Treasury to prescribe regulations for the filing of consolidated tax returns "in such manner as clearly to reflect the income-tax liability and the various factors necessary for the determination of such liability * * *" (26 U.S.C. 1502). And to ensure proper collection of the Windfall Profit Tax on oil companies, Congress has instructed the Secretary of the Treasury

> The money thus raised, though paid into the Treasury, is appropriated in advance to the uses of the statute, and does not go to the general support of the government. It constitutes a fund raised from those who are engaged in the transportation of these passengers, and who make profit out of it, for the temporary care of the passengers whom they bring among us and for the protection of the citizens among whom they are landed.

Here, appellee is in the business of transporting hazardous liquids through pipelines. Appellee profits from that business, and Congress has rationally determined that appellee should bear some of the social costs of engaging in this inherently hazardous activity, specifically, the costs of administering the Hazardous Liquid Pipeline Safety Act. Accordingly, Section 7005 is simply an exercise of Congress's "regulation of commerce" (*Head Money Cases,* 112 U.S. at 595). Thus, even if the Constitution placed special limits on the ability of Congress to confer discretionary authority on the Executive in matters related to taxation, such limits would not apply in this case.

3. The constitutional test summarizing the separation-of-powers concerns applicable in this case was announced in *J.W. Hampton*: "If Congress shall lay down by legislative act an intelligible principle to which the [Executive] * * * is directed to conform, such legislative action is not a forbidden delegation of legislative power" (276 U.S. at 409). This test has been repeatedly cited by this Court as the proper measure for judging the validity of Congress's creation of discretionary authority within the Executive Branch. See, *e.g., FEA* v. *Algonquin SNG, Inc.,* 426 U.S. 548, 559 (1976); *National Cable Television*

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to "prescribe such regulations as may be necessary or appropriate to carry out the purposes of this chapter" (26 U.S.C. 4997).

Ass'n, 415 U.S. at 342; see also *Industrial Union Dep't* v. *American Petroleum Inst.*, 448 U.S. 607, 685-686 (1980) (Rehnquist, J., concurring in the judgment). If that test is satisfied, each Branch performs its constitutionally appointed function: Congress enacts substantive policy into law, the Executive Branch can understand that policy and know its limits, and the Judicial Branch can judge whether the Executive is obeying the law.

Section 7005 of COBRA plainly sets forth "an intelligible principle to which the [Executive] * * * is directed to conform." Section 7005 directs the Secretary to assess and collect fees to cover the costs of administering the Hazardous Liquid Pipeline Safety Act and the Natural Gas Pipeline Safety Act. It requires that these fees be collected from persons operating facilities subject to the two pipeline safety statutes. The Secretary is instructed to collect funds "sufficient to meet the costs of [the] activities" of the two programs (§ 7005(d), 100 Stat. 141), and the fees may be used only "to the extent provided for in advance in appropriation Acts" (§ 7005(c), 100 Stat. 141); thus Congress sets the total amount of fees to be collected each year. And the Secretary may not exercise unbridled discretion in setting the amount of fees that each company must pay. Rather, the statute sets forth the exclusive factors that the Secretary may consider in creating the schedule—"volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines" (COBRA § 7005(a)(1)).

The Secretary's task, therefore, is clearly defined. He may not collect fees that exceed 105% of Congress's annual appropriations for the pipeline safety programs. He may not collect fees from persons who are not subject to either of the two safety acts. He may not use the funds for

purposes other than administering the two acts. He may not set fees on a case-by-case basis,[7] and he may not consider any factors other than the three criteria set forth in the statute. Plainly, this is not a statute that suffers from "an absence of standards for the guidance of the [Secretary's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed" (*Yakus* v. *United States*, 321 U.S. at 426).

Nor is Section 7005 invalid merely because Congress did not itself establish detailed fee schedules. In *United States* v. *Rock Royal Co-Operative*, 307 U.S. 533 (1939), the Court upheld a statute authorizing the Secretary of Agriculture to set milk prices. The Court noted that Congress did not give the Secretary of Agriculture a "mathematical formula" but, rather, prescribed "the various factors to be considered by the Secretary" (*id.* at 577). Likewise, Congress in this case did not attempt to eliminate the Secretary's discretion entirely by legislating a specific formula; it reasonably set out the factors that the Secretary may consider in executing Congress's policy and left to "administrative judgment * * * the relative weights to be given to these factors." *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U.S. 126, 145 (1941) (upholding statute authorizing Executive Branch to fix minimum wages).

The validity of Section 7005 is most evident when that statutory provision is compared to other statutes that the Court has upheld against a non-delegation challenge. The Court has upheld statutes authorizing the Executive to

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[7] Thus, the Magistrate clearly erred when he said that "the Secretary is given the power to *set* tax brackets or rates for *individual* pipeline companies" (App., *infra*, 10a (second emphasis added)).

recover excessive profits earned on military contracts (*Lichter* v. *United States,* 334 U.S. at 785), to set maximum prices that are generally fair and equitable (*Yakus* v. *United States,* 321 U.S. at 427), to set just and reasonable rates for natural gas (*FPC* v. *Hope Natural Gas Co.,* 320 U.S. 591, 600 (1944)), to license radio communications as public convenience, interest or necessity requires (*National Broadcasting Co.* v. *United States,* 319 U.S. at 225-226), to prohibit unfair methods of competition (*FTC* v. *R.F. Keppel & Bro.,* 291 U.S. at 310), and to approve consolidation of carriers when in the public interest (*New York Central Securities Corp.* v. *United States,* 287 U.S. 12, 24 (1932)). When compared to these other statutes, the Executive authority created under Section 7005 is quite modest—and plainly constitutional.

4. The district court concluded (App., *infra,* 10a) that Section 7005 is unconstitutional because the Secretary has discretion to select among three different criteria set forth in the statute in establishing a schedule of fees. But the court ignored the many limits that Congress placed on the Secretary before he was given some discretion in creating a fee schedule. Whenever Congress passes a statute conferring a measure of discretion on the Executive, at some level the agency charged with implementing the statute must exercise judgment in carrying out Congress's policy. But that fact does not give rise to a constitutional problem. As the Court noted in *Yakus* v. *United States,* 321 U.S. at 425-426, Congress "is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers." So long as the statute meets the "intelligible principle" test of *J.W. Hampton,* the Constitution's requirement of separation of powers is satisfied.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

BRIAN J. MARTIN
Assistant to the Solicitor General

ROBERT S. GREENSPAN
BRUCE G. FORREST
Attorneys

GEORGE W. TENLEY, JR.
Chief Counsel

BARBARA BETSOCK
Attorney
Department of Transportation

JUNE 1988

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Civ. Action No. 86-C-815-E

MID-AMERICA PIPELINE CO., PLAINTIFF

v.

ELIZABETH H. DOLE, DEFENDANT

[Filed Aug. 5, 1987]

FINDINGS AND RECOMMENDATIONS OF MAGISTRATE

The above-styled case was referred to the Magistrate for findings and recommendations on cross-motions for summary judgment. A hearing on the motions was held on March 25, 1987, at which time both sides presented oral arguments. Having carefully considered the motions, briefs, oral arguments and relevant legal authority, and Magistrate finds as follows:

Plaintiff Mid-America Pipeline Company brought this action seeking a declaratory judgment that § 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("the Act"), Pub. L. No. 99-272, 100 Stat. 82 (1986) is an unconstitutional delegation of the taxing power and an injunction prohibiting the Secretary of Transportation from enforcing or otherwise acting pursuant to the Act.

The parties concede that there is no genuine issue of material fact; the only issues involved here are legal ones:

(1) whether the "user fees" contemplated by § 7005 are fees or taxes, and (2) if § 7005 imposes a tax, whether Congress may delegate the taxing power in this manner.[1]

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[1] Section 7005 provides:

(a) Establishment. –

(1) Schedule. – The Secretary of Transportation (hereafter in this section referred to as the "Secretary") shall establish a schedule of fees based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines. In establishing such schedule, the Secretary shall take into consideration the allocation of departmental resources.

(2) Collection – The Secretary shall establish procedures for the collection of such fees. The Secretary may use the services of any federal, State, or local agency or instrumentality to collect such fees, and may reimburse such agency or instrumentality a reasonable amount for such services.

(3) Liability. – Fees established under this section shall be assessed to the persons operating –

(A) all pipeline facilities subject to the Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. App. 2001 et seq.); and

(B) all pipeline transmission facilities and all liquefied natural gas facilities subject to the jurisdiction of the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. App. 1671 et seq.).

(b) Time of Assessment. – The Secretary shall assess and collect fees described in subsection (a) with respect to each fiscal year before the end of such fiscal year.

(c) Use of Funds. – Funds received under subsection (a) shall be used, to the extent provided for in advance in appropriate Acts, only –

(1) in the case of natural gas pipeline safety fees, for activities authorized under the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. App. 1671 et seq.); and

(2) in the case of hazardous liquid pipeline safety fees, for activities authorized under the Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. App. 2001 et seq.).

With regard to the first issue, the Magistrate finds that the assessments contemplated by § 7005 are, in fact, taxes, not "fees based on usage".

In *National Cable Television Association v. United States,* 415 U.S. 336, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974), the Supreme Court explained the distinction between a "fee" and a "tax". There the Court stated:

> Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. A fee, however, is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society. (Footnote omitted.)

Examples of fees which have survived constitutional challenge can be found in *Phillips Petroleum Co. v. F.E.R.C.*, 786 F.2d 370 (10th Cir. 1986) (fees charged for agency review of tariff filings and other requested services); *Nevada Power Co. v. Watt,* 711 F.2d 913 (10th Cir. 1983) (fees charged by agency for processing applica-

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(d) Fee Schedule.—Fees established by the Secretary under subsection (a) shall be assessed against all natural gas and hazardous liquids transported by pipelines subject to the Natural Gas Pipeline Safety Act of 1968 and the Hazardous Liquid Pipeline Safety Act of 1979 after September 30, 1985, and shall be sufficient to meet the costs of activities described in subsection (c), beginning on October 1, 1985, but at no time shall the aggregate of fees received for any fiscal year under this section exceed 105 percent of the aggregate of appropriations made for such fiscal year for activities to be funded by such fees.

tions for rights-of-way); *Mississippi Power & Light v. U.S. Nuclear Regulatory Commission,* 601 F.2 223 (5th Cir. 1979) (fees charged by the agency for routine inspections necessary for issuance and retention of operating license.)

Where no request for an agency's services is made and no specific benefit is conferred upon the one being assessed, the assessment cannot be labelled a "fee". In *United States v. River Coal Co.,* 748 F.2d 1103 (6th Cir. 1984), the court held that mine reclamation fees under the Surface Mining Control & Reclamation Act of 1977, 30 U.S.C. § 1201 et seq. (1982), are in fact taxes because the "fee" does not confer a benefit on the operator different from that enjoyed by the general public when the environment is improved. Instead, the court likened the fee to an "involuntary exaction for a public purpose." 748 F.2d at 1106.

The Supreme Court in *Fed. Power Comm'n v. New England Power Co.,* 415 U.S. 345, 94 S.Ct. 1151, 39 L.Ed.2d 383 (1974), considered the validity of the Federal Power Commission's assessments under the Natural Gas Act and Federal Power Act, levied in an effort to recoup the Commission's costs of administering these Acts. There, the Court held that because the Independent Offices Appropriations Act of 1952, which authorizes the assessment of fees for services rendered by a government agency, covered only fees (not taxes), the Federal Power Commission could not charge fees to industry members which had neither asked for nor received services from the Commission. The Court agreed with the reasoning of the Court of Appeals for the District of Columbia that a fee covers only specific charges for specific services to specific individuals or companies. 415 U.S. at 349, 94 S.Ct. at 1154, 39 L.Ed.2d at 387.

The assessment under § 7005 is not "incident to a voluntary act", *National Cable, supra,* nor does it "bestow a benefit on the applicant not shared by other members of society." *Id.* It, too, could easily be likened to "an involuntary exaction for a public purpose," *United States v. River Coal, supra,* the purpose being the regulation of natural gas and hazardous liquid pipeline useage. Therefore, the Magistrate concludes that the "fees" assessed under § 7005 are taxes.

Having concluded that § 7005 imposes a tax upon persons operating all pipeline facilities subject to the Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. 2001 et seq. (HLPSA), and the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. 1671 et seq. (NGPSA), the remaining issue is whether Congress's delegation of authority under this statute to the Secretary of Transportation amounts to an unconstitutional delegation of the taxing power.

Art. I, § 8, Cl. 1 of the United States Constitution states that "[t]he Congress shall have Power to lay and collect Taxes. . . ." From the Supreme Court's holding in *National Cable, supra,* plaintiff argues that any congressional delegation of revenue raising authority must be in the form of a fee, not a tax. Plaintiff directs the court's attention to several treatises on constitutional law and the history of the Taxing Power which declare that the taxing power is non-delegable, including J. Freedman, *Crisis & Legitimacy: The Administrative Process and American Government* (1978), wherein Professor Freedman explains that National Cable is one of a class of cases "in which the legislature seeks to delegate a power that may not be delegated, even though the legislature itself may exercise the power constitutionally. The Power of Congress to levy taxes . . . [is] of this character." *Id.* at 88.

The defendant, on the other hand, argues that Congress may delegate the taxing power in the same manner as it may delegate any other enumerated power. In support defendant cites *J. W. Hampton & Co. v. United States,* 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624 (1928), and *American Power & Light Co. v. Securities & Exchange Commission,* 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103 (1946).

In *Hampton, supra,* the Supreme Court considered the constitutionality of § 315 of Title III of the Tariff Act of September 21, 1922, Ch. 356, 42 Stat. 858, 941, which authorized and directed the president to increase or decrease duties imposed by the Tariff Act, so as to equalize the differences which he found existing between the costs of producing at home and in foreign countries the types of goods and articles to which such duties apply.

The taxpayer petitioner argued that § 315 was an unconstitutional delegation to the president of the legislative power to lay and collect taxes and duties. In rejecting petitioner's argument, the Court first analyzed the purpose of § 315: to secure by law the imposition of customs duties on imported merchandise which would equalize the difference between the cost of producing goods abroad and producing the same goods in the United States. Although it may have been difficult from a practical standpoint for Congress to have determined what precise differences exist in the cost of goods, the Court found that § 315 of the Tariff Act clearly defined the difference which it sought to eradicate.

The delegation under § 315 was not a delegation of the taxing power; rather it was a delegation to the executive branch of the power to implement the tariff plan established by the legislature. As the Court explained:

> Congress adopted in § 315 the method of desribing with clearness what its policy and plan was and then authorizing a member of the executive branch to

> carry out this policy and plan, and to find the changing difference from time to time, and to make the adjustments necessary to conform the duties to the standard underlying that policy and plan.

Congress may use executive officers to apply and enforce a policy or law set by Congress, including the application and enforcement of tax law. However, Congress may not delegate to any executive office or agency the authority or discretion to determine what the law shall be. *Hampton*, 276 U.S. at 408-409.

With these principles in mind, the *Hampton* Court held that "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.* at 409.

Nineteen years later, the Supreme Court, in *American Power & Light, supra,* considered and rejected a claim that § 11(b)(2) of the Public Utility Holding Company Act of 1935 was an unconstitutional delegation of legislative power to the Securities and Exchange Commission ("SEC"). Section 11(b)(2) provided that the SEC shall act so as to ensure that the corporate structure or continued existence of any particular company in a holding company system does not "unduly or unnecessarily complicate the structure" or "unfairly or inequitably distribute voting power among the security holders." 329 U.S. at 104. American Power & Light Co. argued that the statute was unconstitutional because it did not set forth any standards to be used by the SEC in making its determination. The Court, however, found that the standards to be used in determining when holding company structures are unnecessarily complicated and when voting rights are inequitably distributed were readily ascertainable from the

Act itself: § 1(b)(c) of which set forth the general policy of the Act and Congress's legislative intent in passing the Act; § 7 which set standards for new security issues; and § 10 which addressed acceptable conditions for acquisition of properties and securities.

Section 11(b)(2) passed constitutional scrutiny because the Court determined that in drafting the statute Congress clearly delineated the general policy, the agency which was to apply it and the boundaries of the agency's authority under the statute.

Using *Hampton, supra,* and *American Power & Light, supra,* as guidelines, the Magistrate has examined the statute now in question, § 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985.

From the statute itself and its legislative history, the purpose of § 7005 is clear: to recover the total costs incurred by the Department of Transportation in administering the safety programs under the Natural Gas Pipeline Safety Act (NGPSA) and the Hazardous Liquid Pipeline Safety Act (HLPSA). All persons operating a pipeline subject to either the NGPSA or HLPSA are to be assessed a fee. The only statutory language which concerns the amount of the fee is found in Subsection (d) where it states that the aggregate fee for any fiscal year shall not exceed 105 percent of the appropriations passed by Congress for enforcement of the NGPSA and the HLPSA. The only directive given regarding the amount of the assessment to each user pipeline company is the statutory language that such fees shall be "based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof", § 7005(a)(1).

Unlike *Hampton* and *American Power & Light,* this statute does not give any clear guidance as to how much money is to be assessed. The standard in *Hampton* was the difference in production costs at home and abroad. It was

not left in the executive officer's discretion to set a standard and then apply it. The president was only asked to apply a standard of duty measurement which had been carefully laid down by Congress.

The Magistrate finds that the statute does not define by sufficient criteria the amount of "tax" to be assessed to each "user" pipeline facility. Although the statute prescribes that the amount be "based on the usage, in reasonable relationship to volume-miles, miles, revenues or an appropriate combination thereof . . .", the fact is that the Secretary is free to appropriate the cost of regulation in almost any way she sees fit. Due to the loose language of the statute, there is a wide-ranging potential impact on the individual pipeline facilities.

Exhibit A demonstrates the disparity of assessment, depending upon what assessment criteria the Secretary uses. For example, based upon the 1985 totals of miles of pipeline, barrel miles, or gross revenues for a sample of pipeline corporations, if the Secretary based the § 7005 assessment solely on pipeline miles, plaintiff Mid-America would have been required to pay 28.3% of the total amount of the Congressional appropriation; if the assessment were based on barrel miles, Mid-America would have been charged 5.0% of the total appropriation; and if the Secretary used gross revenue as the assessment measure, Mid-America would have been assessed 12.2% of the total appropriation.

The same calculations as applied to the total 1985 figures for Colonial Pipeline Company illustrate that if the Secretary used pipeline miles as the assessment standard, Colonial would have been required to pay 18.5%; if barrel miles were the standard, Colonial would have been charged with 70.9% of the total appropriation; and if gross revenue were the standard, Colonial would have been assessed 49.4% of the total congressional appropria-

tion. Should the Secretary choose to use a combination of these standards, the percentage amount to be assessed each company could be almost any figure from 0-100% of the entire appropriation. Under this statutory scheme the Secretary is given the power to *set* tax brackets or rates for individual pipeline companies.

Defendant suggests that the power of the Secretary under the challenged statute is similar to that bestowed on the Internal Revenue Service under the Internal Revenue Code. Title 26 U.S.C. § 1 et seq. In that regard the Magistrate has examined the enabling legislation of the I.R.S. and finds that the function of the I.R.S. in implementing the federal tax laws is much more limited than the role of the Secretary of Transportation under § 7005 of the Omnibus Budget Act of 1985.

On July 1, 1862, Congress created the office of the Commissioner of Internal Revenue "for the purpose of superintending the collection of internal duties, stamp duties, licenses, or taxes imposed by this act, or which may be hereafter imposed, and of assessing the same. . . ." Tax Act, Ch. 119, 12 Stat. at Large 432 (1862). Congress then went on to specifically delineate the exact nature and amount of each tax, license, and duty which the Commissioner of Internal Revenue was to collect and assess.

Here, the amount of the "fee" to be imposed upon each "user" under § 7005 was left to the discretion of the Secretary. This statute asks more from the Secretary than aid in implementing a tax established by the legislature; it asks the Secretary of Transportation to use her discretion and *set* the rate of fees which is in fact a tax, and then go one step further and collect such taxes.

Without the Congressional guidance and direction given the I.R.S. in the Internal Revenue Code or found in the statutes considered in *Hampton* and *American Power & Light*, the Magistrate finds that § 7005 of the Omnibus

Budget Reconciliation Act of 1985 is an unpermissible delegation of the legislative power to assess taxes. Therefore, the Magistrate recommends that plaintiff's motion for summary judgment be granted and defendant's motion for summary judgment be denied.

Dated this 5th day of August, 1987.

/s/ John Leo Wagner

JOHN LEO WAGNER
United States Magistrate

EXHIBIT A

PERCENTAGE OF TOTAL APPROPRIATION

COMPANIES	MILES OF PIPELINE	BARREL MILES	GROSS REVENUE
Explorer Pipeline Company	1397	107,666,989,936	82,690,098
Mid-America Pipeline Company	8123	43,822,893,500	116,025,010
Colonial Pipeline Company	5301	626,190,935,768	468,152,311
Williams Pipeline Company	9210	53,885,600,000	149,729,978
Seminole Pipeline Company	774	21,209,045,800	28,526,191
Dixie Pipeline	1303	16,652,230,945	40,950,411
Sun Pipe Line Company	2569	14,192,870,801	61,469,468

(This data is based upon Form 6 filed with Federal Energy Regulatory Commission (1985).)

EXHIBIT A – Continued

PERCENTAGE OF TOTAL APPROPRIATION – Continued

COMPANIES	TAX % IF BASED ON MILES	TAX % IF BASED ON BBL MILES	TAX % IF BASED ON GROSS REVENUE
Explorer Pipeline Company	4.9%	12.2%	8.7%
Mid-America Pipeline Company	23.3%	5.0%	12.2%
Colonial Pipeline Company	18.5%	70.9%	49.4%
Williams Pipeline Company	32.1%	6.1%	15.8%
Seminole Pipeline Company	2.7%	2.4%	3.0%
Dixie Pipeline	4.5%	1.9%	4.3%
Sun Pipe Line Company	9.0%	1.6%	6.5%

(This data is based upon Form 6 filed with Federal Energy Regulatory Commission (1985).)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 86-C-815-E

MID-AMERICA PIPELINE CO., PLAINTIFF

v.

ELIZABETH H. DOLE, DEFENDANT

[Filed Dec. 30, 1987]

ORDER

The Court has for consideration the Findings and Recommendations of the Magistrate filed August 5, 1987. After careful consideration of the record and the issues, including the briefs and memoranda filed herein by the parties, the Court has concluded that the Findings and Recommendations of the Magistrate should be and hereby are affirmed and adopted by the Court.

It is so Ordered this 30th day of December, 1987.

s/ James O. Ellison

JAMES O. ELLISON
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Civil No. 86-C-815-E

MID-AMERICA PIPELINE CO., PLAINTIFF

v.

ELIZABETH H. DOLE, DEFENDANT

[Entered Feb. 9, 1988]

JUDGMENT FOR DECLARATORY AND INJUNCTIVE RELIEF

This action came before the Court, Honorable James O. Ellison, District Judge, presiding, on cross-motions for summary judgment, and the issues having been duly heard, and a decision having been duly rendered granting Plaintiff's Motion for Summary Judgment,

IT IS HEREBY ORDERED AND ADJUDGED

That Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Public Law No. 99-272, 100 Stat. 82 (1986), is declared unlawful as violative of the United States Constitution, and

That Defendant Secretary of Transportation is permanently enjoined from enforcing as against Plaintiff Mid-America Pipeline Company Section 7005 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Public Law No. 99-272, 100 Stat. 82 (1986).

JUDGMENT IS ACCORDINGLY ENTERED FOR PLAINTIFF AND AGAINST DEFENDANT.

Dated at Tulsa, Oklahoma this 8th day of Feb. 1988.

/s/ James O. Ellison

JAMES O. ELLISON
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Civ. Action No. 86-C-815E

MID-AMERICA PIPELINE CO., PLAINTIFF

v.

ELIZABETH H. DOLE, SECRETARY OF TRANSPORTATION, DEFENDANT

[Filed Mar. 9, 1988]

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the defendant Secretary of Transportation hereby appeals to the Supreme Court of the United States from the JUDGMENT FOR DECLARATORY AND INJUNCTIVE RELIEF entered February 9, 1988.

This appeal is taken pursuant to 28 U.S.C. § 1252 and 28 U.S.C. § 2101.

Done this 9th day of March, 1988.

Respectfully submitted,

RICHARD K. WILLARD
Assistant Attorney General

TONY M. GRAHAM
United States Attorney

/s/ Peter Bernhardt

PETER BERNHARDT
Assistant United States Attorney

/s/ Sandra M. Schraibman

SANDRA M. SCHRAIBMAN

/s/ Renee M. Wohlenhaus

RENEE M. WOHLENHAUS

Attorneys, Department of Justice
Civil Division – Room 3334
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
Telephone (202) 633-5532

Attorneys for Defendant

Of Counsel:

GEORGE W. TENLEY, JR.
Chief Counsel

BARBARA BETSOCK

Attorneys
Research and Special
Programs Administration
Department of Transportation